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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-668

ALABAMA ASSOCIATION OF INSURANCE AGENTS, INC., *et al.*,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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Petitioners, the Independent Insurance Agents of America, Inc., its constituent state associations and various individual member agencies in the States of Alabama and Georgia, hereby reply to the brief in opposition for the respondent Board of Governors of the Federal Reserve System ("Board").

I. REBUTTAL OF BOARD ARGUMENTS

A. *Violation of the Board's Regulation.* The Board's allegation that the petitioners' contention that the Board

violated its own regulation was not presented to the court of appeals is *false*.[1] In fact, petitioners argued the point in their reply briefs to the court of appeals and again in their petition for rehearing.[2] In 1971 the Board determined specifically that it is the *fiduciary responsibility* of an insurance agency applicant to offer insurance to the public at the *lowest practicable price*.[3] The Board cannot now be heard to argue that an applicant's failure to meet this fiduciary responsibility "is irrelevant to the Board's . . . 'public benefit' determination." [4]

B. *Conflicts with Other Courts of Appeals—Application of the "Public Benefits" Test.* The Board's brief is not responsive to petitioners' contention that the decision below fundamentally conflicts with previous holdings of other courts of appeals regarding the proper application of the "public benefits" test.[5] Either Section 4(c)(8) requires applicants to make specific showings of how they intend to operate their proposed nonbanking activities, or it does not. The courts of appeals for the Eighth and the District of Columbia Circuits have said that it does; the court of appeals below has ruled that it does not.[6] This Court should resolve that fundamental conflict.

C. *Arrogation of Decision Making.* As the Board concedes in its brief,[7] the court of appeals struck down the Board's findings regarding *two out of three* of the "public

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[1] Respondent's Brief, at 11 n.7.

[2] *See* Petitioners' Alabama Reply Brief, at 17-18 (filed June 6, 1975); Petitioners' Georgia Reply Brief, at 18-19 (filed June 6, 1975); Petitioners' Petition for Rehearing, at 10-11 (filed July 8, 1976).

[3] *See* 36 Fed. Reg. 15,525, 15,526 (1971); Petition, at 17.

[4] *See* Petition, at 17. *But see* Respondent's Brief, at 11 n.7.

[5] Respondent's Brief, at 8-9.

[6] *See* Petition, at 14-15.

[7] Respondent's Brief, at 9.

benefits" factors of the overall test—greater convenience and gains in efficiency.[8] More than that, however, the court specifically recognized that the record evidence suggested that the applicants' proposals would actually result in *less convenience* and *reduced efficiency*[9]—both of which would obviously adversely affect borrowers who choose to purchase their insurance through the applicants' agencies.[10] Given these adverse effects,[11] under the logic of the Board's own brief, the court of appeals should have set aside the Board's orders.[12]

D. *Violation of State Law.* The Board in its brief now argues that "[t]he court of appeals recognized that Alabama law would not permit a bank to operate with only one licensed insurance agent in [the] state . . . ." [13] The point is, however, that the Board specifically found that the Alabama applicant "will initially have but one licensed agent at the head office of its lead bank . . . ." [14] In other words, the Board approved an application which it now concedes was in clear violation of state law. Once again, the logic of the Board's own brief shows that the court of

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[8] Petition Appendix A, at 37a-41a.

[9] *Id.* It should also be emphasized that, with respect to increased competition—the only remaining public benefits factor of the test—the court characterized the supporting evidence as "vague." *Id.* at 41a-42a. *See* note 18 and accompanying text *infra*.

[10] *See* Petition, at 16, 17-18, 20.

[11] Furthermore, given Congress's concern, the Board's previous pronouncements and the Administrative Law Judge's categorical findings regarding the possibility of decreased competition as a result of "voluntary tying," the Board's rejection of the "voluntary tying" issue in the context of these cases is not credible. *See* Petition, at 10 n.28, 19 n.65.

[12] In addition, the factual predicate for a finding of increased competition is destroyed. *See* notes 18-23 and accompanying text *infra*.

[13] Respondent's Brief, at 10.

[14] Petition Appendix E, at 74a.

appeals should have set aside the Board's order relating to that applicant.

E. *Conflict with the Administrative Law Judge.* The Board's contention that its finding of increased competition was consistent with the recommendation of the Administrative Law Judge below is misleading.[15] While the Administrative Law Judge did find that approval of the application in question would increase the quantity of competition in the short term,[16] that finding must be read in conjunction with his ultimate conclusion that the quality of the competition would be destructive to independent agents and, in the end, would result in *decreased* competition.[17]

F. *Substantial Evidence.* The only evidence supporting the Board's public benefits findings was characterized by the court of appeals as "vague." [18] Furthermore, the court's reference, in the context of increased competition, to "pressure for lower prices" and "customer-attracting advantages of one-stop shopping" [19] renders the court's decision internally contradictory in light of its earlier recognition that approval of the applications might actually result in "efficiency loss" [20] through the "negative efficiency effects of non-use of direct billing," [21] and a

[15] *See* Respondent's Brief, at 10. *But see* Petition, at 18-19.

[16] At the place cited by the Board for authority, the Administrative Law Judge states that "[a]pproval of the application would probably result in additional *units* of insurance agency competition but there is no proof that such would result in savings to customers in the form of lower premiums." Petition Appendix H, at 135a (emphasis added).

[17] Petition Appendix H, at 138a-39a.

[18] *See* Petition, at 20. *See also* note 9, *supra*. *But see* Respondent's Brief, at 10.

[19] Petition Appendix, at 41a.

[20] *Id.* at 40a.

[21] *Id.* at 41a.

"decrease in convenience" [22] as a result of the remoteness of applicants' agents from consumers. Accordingly, the factual predicate which must underlie any finding of increased competition was not present in these cases, and consumers are left to pay *higher* prices for insurance under circumstances of *reduced* convenience.[23]

G. *Conflicts with Other Courts of Appeals—"Closely Related" Test.* The Board concedes that the "closely related to banking" standard adopted by the court of appeals in the instant cases is broader than was applied by at least one other court of appeals.[24] Furthermore, the Board's argument ignores the fact that, unlike in the case of insurance sold in connection with "extensions of credit," the court approved the sale of insurance which is "directly related to the provision of other financial services" [25] without any discussion as to why it sustained that portion of the regulation.

II. CONSEQUENCES OF A FAILURE TO GRANT A PETITION

Denial of the instant petition would leave standing a court of appeals decision which holds that Section 4(c)(8) of the Act permits the Board to approve nonbanking applications even though (i) the manner in which the proposed activities will be conducted is not explained,[26] (ii) the Board makes assumptions—not supported by the rec-

[22] Petition Appendix A, at 38a.

[23] *See* Petition, at 17-18.

[24] *See* Respondent's Brief, at 7. *But see* Petition, at 12-13. Further, the Board tries to sustain part of its argument by reference to a Senate Report supporting the "functionally related to banking" standard which was rejected when the legislation was ultimately enacted. *See* Respondent's Brief, at 6 n.6.

[25] *See* Petition Appendix I, at 143a-44a.

[26] Petition, at 15.

ord—as to how the applicants will conduct those activities,[27] and (iii) the Board violates its own regulations which makes the provision of nonbanking services at the lowest practicable price to consumers a *fiduciary responsibility* of such applicants.[28] Each of the foregoing deficiencies is a fundamental violation of the Act.

Denial of the instant petition would invite massive entry by bank holding companies into the retail property and casualty insurance industry under circumstances which even the court of appeals recognized might adversely affect consumers.[29] Even worse, the rulings below so emasculate the standards of Section 4(c)(8) of the Act that prospective opponents of bank holding company entry into *any* nonbanking activities—faced with virtually certain defeat—can be expected to forego the enormously expensive litigation associated with Section 4(c)(8) oppositions. This chilling effect may well remove from the province of the courts the review function contemplated by Section 9 of the Act.[30] The continued vitality of the historical separation between banking and commerce in

[27] *Id.* at 17.

[28] *Id.* at 17-18.

[29] *See* notes 18-23 and accompanying text *supra*.

[30] 12 U.S.C. § 1848 (1970).

this nation—a separation the Congress clearly sought to perpetuate through the Act[31]—will become the exclusive domain of the Federal Reserve Board.

Respectfully submitted,

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[31] Petition, at 5 n.11.